ARGUMENT

I

INTRODUCTION

The fundamental issue posed by this case is whether or not the informant system shall remain a vital part of the arsenal of society or whether through judicial action it shall be declared once and for all to be outlawed and prohibited by the constitution. The question here is whether the informant system shall live or die, for this court deals in *McCray v. Illinois*, not with one of the peripheral appendages of the informant system, but rather with the heart of that system.

As stated by Wigmore in his treatise on evidence:

> "A genuine privilege, on the fundamental principle stated *supra* §2285, must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.*[1] Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities.

> Revelation of the dual role played by such persons ends their usefullness to the government and discourages others from entering into a like relationship." Wigmore on Evidence (McNaughton rev. 1961) §2374, pp. 761-762; footnote omitted; emphasis in original.

We submit, however, that nondisclosure of the identity of the informant does not strike at the heart of the protection afforded by the Fourth Amendment against unreasonable searches and seizures so long as the informant is not a material witness on the issue of the guilt of the defendant and so long as the trial judge, in the sound exercise of his discretion, is convinced by evidence presented in open court and subject to cross-examination that there was a proper basis for the police officer believing that the informant was reliable and that there was a proper basis for the police officer believing that the information provided by the informant in the particular case at issue was also reliable. As we understand the law established by the judiciary in Illinois and the legislature in California, there is no absolute right not to disclose the name of an informant, but rather the trial judge after hearing evidence presented in open court and subject to cross-examination must have before him a basis for concluding that the disclosure of the informant is not necessary in light of clear and convincing evidence that the informant is reliable and his information is reliable. We do not discuss in this brief the circumstances under which such discretion to require disclosure should be exercised but rather urge in this brief that this court should permit the exercise of such discretion and only overturn a state conviction when the abuse of such discretion is

such as to constitute a violation of some protection afforded by the constitution to those accused of crime.[1]

This constitutional issue of whether disclosure should be discretionary, subject to review of alleged abuses of discretion constituting alleged constitutional infractions, can best be analyzed by probing precedent and principle.

II
PRECEDENT

A. California

The requirement in California that there be disclosure of the identity of an informant whose sole usefulness relates to the legality of a search and seizure, as distinguished from guilt or innocence, was first established in this state in *Priestly v. Superior Court,* 50 Cal. 2d 812, 330 P. 2d 39 (1958). At that time the prohibition against illegal searches and seizures was still deemed to be a matter subject to the exercise of supervisory powers by the states, since *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), had not been decided as of that date. Since California courts pursuant to their supervisory powers had held that illegally seized evidence would no longer be admissible in California, *Priestly* was a further implementation of that supervisory power.

As distinguished from the supervisory basis of *Priestly,* California had also adopted the rule that where the informant was material to the issue of guilt or innocence, either as a participant in the crime or as a per-

[1]It should be noted, however, that the opinion of the Supreme Court of Illinois in the present case appears to set forth sufficient facts disclosed by the prosecution to warrant upholding the trial judge's determination not to require disclosure.

cipient witness, disclosure was required. See *People v. McShann,* 50 Cal. 2d 802, 330 P. 2d 33 (1958). However, such disclosure was required on a constitutional basis. See *Roviaro v. United States,* 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957), relied upon in *People v. McShann, supra.*

Because *Priestly* was poised on a supervisory basis whereas *McShann* was poised on a constitutional basis, the California Supreme Court drew a distinction between the two in *People v. Keener,* 55 Cal. 2d 714, 12 Cal. Rptr. 859 (1961). There it was held that so long as the informer was not "a material witness with respect to facts directly relating to the defendant's guilt" (55 Cal. 2d at 724, 12 Cal. Rptr. at 864), his identity need not be disclosed if the People conduct the search pursuant to a search warrant based upon an affidavit containing information supplied by an undisclosed, but reliable, informant.

The experience in the State of California under this state of the law, whereby if the police proceeded with a warrant the informant need not be disclosed and if they proceeded without a warrant the informant must be disclosed, was found by the legislature to be such that a change in the law was required in order to properly enforce the laws regulating narcotics in this state. The history of this change in the law is clearly set forth in a letter from the Attorney General of California to the Governor of this state, a copy of which is attached hereto as an appendix and which has been submitted to the California Supreme Court in its consideration of *Martin v. Superior Court.* The report of the Assembly Interim Committee which urged the passage of the bill

that was eventually signed by the Governor states as follows:

> "The committee recognizes a legitimate concern among law enforcement officials for protection of their informants. Furthermore, since the use of informants is especially valuable in narcotics prosecutions, there is a special need to shield those informants from disclosure to as great a degree possible compatible with the constitutional rights of the defendant.
>
> "The committee is anxious, however, that the evidence presented to justify the reliability of the informant be substantial evidence presented in open court and not in closed proceedings, and it has added language to the bill to that effect." (Report of the Assembly Interim Committee on Criminal Procedure, January 1, 1965, Volume 22, Number 8, Page 53.)

We submit the fact that California concluded that a system of absolute disclosure required a partial change is evidence that a requirement that the states be compelled under any and all circumstances to disclose informants whose information is relied upon solely for the purposes of justifying an arrest and search and seizure incidental thereto is a factor which would be weighed upon the scales in the delicate balance between the rights of society and the rights of the individual in this case. We will discuss in Part III of this brief the reasons why California might have concluded that the rules established by its judiciary have not proven

satisfactory enough to warrant their continuance in the attempt to control the use and abuse of narcotics.

B. Prior United States Supreme Court Cases

Since we believe that counsel for the parties in this case will undoubtedly discuss the prior cases decided by this court which are applicable to the case at bar, we shall not set forth herein any extensive discussion thereof. (It should be noted that, as yet, we have not had an opportunity to review the brief to be filed by the State of Illinois in this court.) However, we do wish to offer some brief comments on some prior cases in order that this court may understand the position we urge herein.

The position we urge is that this court re-affirm what it decided in *Roviaro v. United States,* 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957). In that case this court stated as follows:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. 62, 1 L. Ed. 2d at 646, 77 S. Ct. at 628-629.

The principle enunciated in *Roviaro v. United States* was recently re-affirmed in *Aguilar v. Texas,* 378 U.S.

108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964), wherein this court stated as follows:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, *whose identity need not be disclosed, see Rugendorf v. United States,* 376 U.S. 528, 84 S.Ct. 825, was 'credible' or his information 'reliable.'" (378 U.S. at 114, 12 L.Ed. 2d 729, 84 S. Ct. at 1514 (1964); emphasis added.)

Finally, it should be noted that if *Roviaro* is again re-affirmed in the instant case, the holding of *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965), must necessarily be inapplicable to this case. The constitutional provision relied upon in *Pointer v. Texas* and made applicable to the states by that case (the right to confrontation) was always applicable to federal prosecutions. Thus if the right to confrontation were applicable to the instant case, it should have been applied, but was implicitly rejected, in *Roviaro v. United States* when this Court permitted in a federal prosecution a balance of the "public interest in protecting the flow of information against the individual's right to prepare his defense." 353 U.S. at 62, 1 L. Ed. 2d at 646, 77 S. Ct. at 628-629.

C. Other Jurisdiction

Just as we expect the parties will discuss the applicable cases decided by this court, we have similar expectations with regard to applicable cases from jurisdictions other than California. However, we do wish to call this Court's attention to a recent decision by the Supreme Court of New Jersey which contains an extensive review of applicable law. See *State v. Burnett*, 42 N.J. 377, 201 A. 2d 39 (1964).

III
PRINCIPLE

It must be assumed that when the California Legislature enacted Code of Civil Procedure section 1881.1 it was aware of the balance that the California Supreme Court had sought in respect to the disclosure of informants in *Priestly v. Superior Court* and *People v. Keener*. As noted previously, the California Supreme Court had made disclosure of an informant's name mandatory when law enforcement proceeded without a search warrant and had made it discretionary when law enforcement proceeded to engage in a search with a search warrant.

After a number of years of compliance with this system of law, the legislature of California could rationally have determined that such a system did not carry out the purpose that it was designed to foster. The legislature could have concluded that even though informants were being disclosed where necessary, they were of no use to the defense since the informant

either was never called as a witness by the defendant or could no longer be located by the defendant. As stated in a comment recently appearing in Volume 53 of the California Law Review at page 855:

> ". . . there are numerous examples in the case law where disclosure has been ordered, thus depriving police of an informer's future services and discouraging potential sources of information, yet the informer has not subsequently testified."

The legislature could further have concluded that not only was there no benefit to the defendant but that in those cases where law enforcement refused to disclose the informant, the ability of society to prosecute those who unquestionably violated the law was unduly hampered. In this connection, it must be remembered that we deal in this case with the question not of guilt or innocence, but of probable cause.

The theory underlying the request for revealing the identity of an informant, it must be remembered, is to determine whether or not the police officer is deliberately lying. We submit, however, that the requirement that the identity of the informant be disclosed does not in the main, serve this purpose. In the first place, if an officer desires to lie he could just as well make up a reliable informant whose name he does not know as a reliable informant whose name he does know. In California, for example, the use of information from an anonymous reliable informant is permissible. See *People v. Prewitt*, 52 Cal. 2d 330, 341 P. 2d 1 (1959).

Furthermore, the mere fact that the defendant knows the identity of the informant and is able to question the informant does not truly aid the defendant since at best, the informant could say (a) I lied to the officer, or (b) I did not tell the officer anything. If the informant lied to the officer, the officer still had probable cause even though what he was told was false, so long as he had a reasonable basis for believing that what he was told was true. Thus the issue is not whether the informant speaks the truth but whether the officer had a reasonable basis for believing that the informant spoke the truth. If the informant says he did not tell the officer anything, an issue of credibility will be raised. We submit that this issue will normally be resolved in favor of the police officer rather than the informant and that such a resolution is just common sense. As stated by the California Supreme Court in *People v. Prewitt,* 52 Cal. 2d at 338, 341 P. 2d at 5, "It cannot be presumed, however, that officers will commit perjury . . ." The motivation for the informant lying is evident, however. He may be afraid for his own safety. Furthermore, if the officer, in fact, were lying, does it not seem reasonable that the same officer might procure the favorable testimony of the informant by offering him certain inducements. In short, in spite of all the safeguards that society may interpose, if an officer intends to lie he will find means to evade the effect of a rule requiring disclosure. The honest officer will be the only officer who will suffer for he will, where necessity requires it, refuse to disclose

the informant and as a result society will suffer from its inability to prosecute. As stated by the California legislative committee which urged passage of the bill finally enacted into law in California:

> "The committee recognizes a legitimate concern among law enforcement officials for protection of their informants. Furthermore, since the use of informants is especially valuable in narcotics prosecutions, there is a special need to shield those informants from disclosure to as great a degree possible compatible with the constitutional rights of the defendant." (Report of the Assembly Interim Committee on Criminal Procedure, January 1, 1965, Volume 22, Number 8, Page 53; see also the letter of California Attorney General Lynch attached hereto as an appendix.)

We submit that the United States Constitution compels only that a defendant whose arrest is based upon information received from an informant be afforded a reasonable opportunity to determine whether the officer acted with probable cause under the circumstances of the case. This we submit can be determined by permitting the defendant adequate cross-examination in all areas relating to the informant except his identity. We believe the judicial officers who must in the end make the ultimate determination as to whether the officer is telling the truth will properly be able to perform this difficult task of segregating truth from falsehood which is present when anyone takes the stand, be he police officer, defendant, or disinterested witness. By the use of extensive cross-examination by the defendant, as was

apparently permitted by the Illinois judge in *People v. McCray,* the judge will be able to determine whether and when the identity of the informant is of such crucial importance as to require the disclosure of the informant so as to be certain that no violation of the Constitution has occurred. We believe that the judiciary, sitting as a trier of fact in the trial court, is capable of making this decision without a requirement that in every case where probable cause is based solely upon information supplied by an informant the identity of that informant must be disclosed.

Respectfully submitted,

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APPENDIX

June 24, 1965

Honorable Edmund G. Brown
Governor of the State of California
State Capitol Building
Sacramento, California

Dear Governor:

Assembly Bill 979 authored by Assemblyman Winton has recently been passed by the California Legislature and is now on your desk. Assembly Bill 979 provides, in effect, that information received from a known, unidentified informant, whose reliability has been proven to the satisfaction of a judge, constitutes probable cause for arrest. The bill is limited to narcotics cases and would not affect the right to disclosure of the identity of an informant who is a participant in a narcotics transaction or otherwise a material witness to guilt or innocence.

It should be observed that this bill has received long and careful study prior to its passage by the Legislature. The original bill was introduced during the 1963 session of the Legislature at which time the Assembly Criminal Procedures Committee sent it to interim study. At the Interim Committee hearing Stanley Mosk, former Attorney General, pointed out that the bill failed to specify the nature of the proceedings at which the judge would determine the reliability of the informant and that a defendant might be denied the right to confront and cross-examine witnesses. Former Attorney General Mosk therefore recommended that the bill be amended to make it clear that evidence of the reliability of the informant must be presented in open court and that the

testifying officer could be cross-examined fully as to the facts establishing reliability.

By such modification the bill respects the constitutional rights of a defendant and also encourages the free flow of information to law enforcement officers. Thereafter the Assembly Criminal Procedures Committee in its interim report recommended that the bill as amended be passed by the 1965 session of the California Legislature.

The substantial protections against unlawful search present in the warrant procedure have been provided for in Assembly Bill 979. Thus the validity of the search is reviewed by a judge, not a police officer, and the search or arrest is upheld only when the judge is satisfied that there is probable cause, i.e., that informant is reliable. In addition the judge may require disclosure of the informant or even require the informant's presence. Since the Supreme Court in the *Keener* case determined that these safeguards constituted substantial protection against unlawful search it is clear that the similar protections incorporated in Assembly Bill 979 also offer substantial protections against unlawful search.

In conferring with law enforcement officials throughout the State, they have uniformly related that their experience has been that the disclosure requirement has resulted in the dismissal of many cases as well as the termination of investigations prior to the filing of a criminal complaint. Since the use of informants is especially valuable in narcotics prosecutions there is a special need to shield those informants from disclosure to as great a degree possible compatible with the constitutional rights of the defendant. By protecting the

identity of an informant Assembly Bill 979 would foster the communication of information by reliable informants and thereby assist law enforcement in obtaining evidence of crime.

I therefore strongly urge that you give favorable consideration to this bill.

Very truly yours,

THOMAS C. LYNCH
Attorney General

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